

No. 13,746

IN THE

United States Court of Appeals

For the Ninth Circuit

CHOW SING, by his Guardian ad Litem,
Chow Yit Quong,

Appellant,

VS.

HERBERT BROWNELL, JR., Attorney Gen-
eral of the United States,

Appellee.

Upon Appeal from the United States District Court
for the Northern District of California,
Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

JOSEPH S. HERTOGS,

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*To the Honorable William Denman, Chief Judge, and
to the Honorable Clifton Mathews and Honor-
able Homer T. Bone, Associate Judges of the
United States Court of Appeals for the Ninth
Circuit:*

Appellant in the above-entitled cause, presents this, his petition for a rehearing of the above-entitled cause, and in support thereof respectfully shows:

The District Court in its order for judgment dated January 12, 1953 concluded that the "evidence pre-

sented by plaintiff does not conform to the standards fixed in *Ly Shew v. Acheson*," 110 F. Supp. 50 (T. 21). Pursuant to such order the Court on February 17, 1953, approved a finding lodged by appellee that "The person who claims to be plaintiff Chow Sing has failed to introduce evidence of sufficient clarity to satisfy or convince this Court that Chow Yit Quong is the natural blood father of the person known as Chow Sing, or that the person who appeared before the Court claiming to be plaintiff Chow Sing is in truth and in fact Chow Sing."

This Court in its decision dated November 24, 1954, found:

"Thus in effect, the District Court found that Sing had not sustained his burden of proof.

The finding was not clearly erroneous. We therefore accept it as correct * * *."

The finding of the District Court that the appellant had not sustained the burden of proof was predicated upon the standards announced by the Court in *Ly Shew v. Acheson*, supra. Those standards have since been rejected by this Court. See *Mar Gong v. Brownell*, 209 F. 2d 448; *Ly Shew v. Dulles*, decided August 18, 1954. The Seventh Circuit in a recent, well-considered opinion likewise rejected the "clear and convincing proof" theory. *Lee Wing Hong v. Dulles*, 214 F. 2d 753.

The District Court applied this erroneous standard in determining that the appellant had not introduced evidence of sufficient clarity to establish the validity

of his claim. The burden of proof imposed by that Court was over and beyond that prescribed by law. Equity and justice require this Court to consider the findings in the light of the Court's opinion.

Under similar facts, this Court in *Mar Gong v. Brownell*, supra, reversed and remanded with directions to make findings in the light of that opinion. Also compare *Takehara v. Dulles*, 205 F. 2d 560. Appellant by this petition seeks the same relief.

Appellant respectfully requests that this petition for a rehearing be granted and that on such rehearing the decision of this Court and the District Court be reversed and that the case be remanded to the lower Court for further consideration.

Dated, San Francisco, California,
December 22, 1954.

Respectfully submitted,
JOSEPH S. HERTOGS,
*Attorney for Appellant
and Petitioner.*

CERTIFICATE OF COUNSEL

I hereby certify that I am counsel for appellant and petitioner in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
December 22, 1954.

JOSEPH S. HERTOGS,
*Attorney for Appellant
and Petitioner.*